

OVERVIEW

LOCAL MEETS GLOBAL: TRANSITIONAL JUSTICE IN NORTHERN IRELAND

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INTRODUCTION

The transition in Northern Ireland is complex and multifaceted, with extensive social, political, and legal dimensions. Clearly, the 1998 Good Friday/Belfast Agreement (“the Agreement”),¹ entered into by the British and Irish Governments and the bulk of the Northern Ireland political parties, marks a significant turning point in the conflict. Thus, after over three decades of protracted violence, Northern Ireland is experiencing transformation affecting almost all aspects of societal function and identity. But the Agreement’s contents are not entirely novel. They have been heavily influenced by a series of previous initiatives that foreshadowed the institutional architecture now embedded within the Agreement.² Thus, it can be said that the transition in Northern Ireland has been an ongoing and organic process, with elements of reform and change spread throughout the course of the conflict.³

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1. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, *reprinted in* 37 I.L.M. 751 (1998). Note that in the Northern Ireland Act 1998 (Eng.) it is referred to as the “Belfast Agreement.” We have opted here for the more popular usage – “Good Friday Agreement.”

2. The Sunningdale Agreement, Dec. 1973 (Eng.). The Northern Ireland Constitution Act 1973 (Eng.) provided the legislative framework for the structures agreed upon at Sunningdale. See also KEVIN BOYLE & TOM HADDEN, *THE ANGLO-IRISH AGREEMENT COMMENTARY: TEXT AND OFFICIAL REVIEW* (1989).

3. See generally Colm Campbell, Fionnuala Ní Aoláin & Colin Harvey, *The Frontiers of*

Northern Ireland provides a distinctive site for an assessment of the transitional process, while simultaneously sharing a number of characteristics with other places which have experienced political and social transformation. Its particular conceptualization as an extended transition in a western European State offers a means to distinguish the Northern Ireland experience from others. However, it may be a mistake to overemphasize this exceptionality. While facile comparison is to be avoided, the experience of systematic abuses of human rights, of institutional reconstruction, and of the driving role of legal process in initiating and progressing change, is one shared with a wide range of contemporary societies (examples include South Africa, Israel/Palestine, some Latin American States, and the post-Communist Eastern European countries). These common concerns, which are increasingly being analyzed under the "transitional justice" rubric, bind all of these jurisdictions (including Northern Ireland) in ways that can be underestimated. The series of Articles and Essays contained in this Special Issue both emphasize these commonalities, and underscore the difference in the Northern Ireland experience.

The impetus for these reflections springs from the fact that (with some notable exceptions),⁴ there has been a surprising lack of legal analyses applying insights from the transitional justice field to the Agreement and its outworkings. In some respects, this can be explained in terms of a lack of an obvious comparative "fit" with the Northern Ireland experience, generating a sense of a situation that is *sui generis*, and therefore falling outside the boundaries of a discourse developed in response to quite different legal problems. We believe that this lack of application can partly be explained by the fact that the transition in Northern Ireland occurs within a State structure with at least a formal commitment to liberal democracy. By contrast, much current transitional justice literature has focused on authorita-

Legal Analysis: Reframing the Transition in Northern Ireland, 66 MODERN L. REV. 317-45 (May 2003) (forthcoming).

4. CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS (Colin J. Harvey ed., 2000); HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND (2001); and Bill Rolston, *Assembling the Jigsaw: Truth Justice and Transition in the North of Ireland*, 44 RACE AND CLASS 87-105 (2002). This gap is implicitly adverted to in ALEXANDRA BARAHONA DE BRITO, CARMEN GONZÁLEZ-ENRÍQUEZ, & PALOMA AGUILAR EDS., THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES 343-44 (2001).

rian societies, operating outside a liberal-democratic framework, paradigmatically experiencing intense violent conflict.⁵ Not infrequently, commentators on such situations have been in agreement that an “armed conflict” (as the term is used technically in international humanitarian law),⁶ was taking place between the parties in dispute. No such unchallenged consensus has been forthcoming in Northern Ireland.

Yet, as Ruti Teitel’s contribution to this volume makes clear, analyses under the “transitional justice” rubric represent not a single discourse, but rather a fluid, if intersecting, set. Indeed in the post 9/11 world, characterized by fragmentation, insecurity, terrorism, and the seemingly permanent threat of war, there is a sense in which justice discourses are themselves in a process of transition. In this context, a transitional justice discourse may be applicable beyond the frame of paradigmatically conflicted societies, and can function as a prism to understand challenges to international and national legal systems.

In the Northern Ireland context, we assert that there is much to be gained from applying the insights and perspectives of transitional justice discourses to the experience of the conflict in general and the legal framework set out by the Agreement in particular.⁷ As this volume demonstrates, there are multiple aspects of the post-conflict landscape (examples include policing, criminal justice and truth-telling) that are most fully captured by the multiple paradigms offered by transitional justice, and which do not easily fit in another legal or political frame of analysis. Moreover, there are unique aspects of the transitional arrangements in Northern Ireland which augment current transitional discourses, and offer novel solutions to parallel post-conflict problems in other places.

This Essay aims to contribute to this debate, emphasising

5. As José Zalaquett notes: “Many countries formerly under dictatorial regimes, entered a process of what became known as a ‘transition to democracy.’” See *The Pinochet Case: International and Cosmetic Repercussions*, in *THE LEGACY OF ABUSE, CONFRONTING THE PAST, FACING THE FUTURE* (A. Henkin ed., 2002). See generally, RUTI TEITEL, *TRANSITIONAL JUSTICE* (2002); NEIL J. KRITZ ED., *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (1995); CARLA HESSE & ROBERT POST EDS., *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURY TO BOSNIA* (1999).

6. See generally FRITZ KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* (1987); Michael Stohl, *The Nexus of Civil and International Conflict*, in *THE HANDBOOK OF POLITICAL CONFLICT: THEORY AND RESEARCH* (Ted Robert Gurr ed., 1980).

7. Campbell, Ní Aoláin & Harvey, *supra* n.3.

the importance and relative coherence of insights to be gained from applying transitional justice discourses to the landscape of post-Agreement Northern Ireland. Yet, no attempt is made to gloss over disjunctions arising from the specificity of the Northern Ireland situation, nor is the analysis limited straightforwardly to the region. Part I of the Essay assesses the current state of global transitional discourses in the light of the critique of current developments offered by Teitel, Schabas, Hamber, Cavanaugh and others. This is followed in Part II by an examination of the distinctiveness of the broad contours of the Northern Ireland transition, setting the scene for an exploration of more discrete themes affecting the region: the problem of the past (Part III); and the dynamics of institutional change (Part IV). Part V offers some conclusions. The transition in Northern Ireland is ongoing, and it is therefore too early to make an assessment of its overall success. Yet, it may still be possible to draw some tentative conclusions both as to the extent to which transition in the region demands a revision of the theory of transition itself, and as to the scale of the challenges currently faced.

I. *JUSTICE DISCOURSES IN TRANSITION: THE ROLE OF LAW*

Of course, all societies are in transition all the time; but not all societies are in transition from prolonged violent political conflicts of the kind with which much (though not all) transitional justice analysis is concerned. The origins of contemporary transitional discourses lie in the trials instituted in response to the atrocities surrounding the Second World War.⁸ In the 1980s and 1990s, the problem of response to past violations again

8. UNITED NATIONS, GENERAL ASSEMBLY, INTERNATIONAL LAW COMMISSION: REPORT ON THE PRINCIPLES OF THE NUREMBERG TRIBUNALS a/1316 (1950); TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG TRIBUNALS UNDER CONTROL COUNCIL NO. 10 (Washington, D.C. 1949-1953); HANNAH ARENDT, *EICHMAN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1964); and G. HAUSNER, *JUSTICE IN JERUSALEM* (1967). The Nuremberg trials of the major German war criminals have generated a vast literature. For some early writing see H. Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 A.J.I.L. 223 (1949); R.W. COOPER, *THE NUREMBERG TRIAL* (1947); V.H. BERNSTEIN, *FINAL JUDGMENT: THE STORY OF NUREMBERG* (1947); and R.K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* (1962). On the corresponding trials of Japanese war criminals see A.C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1989); R.H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971); and P.R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951* (1979).

came into sharp focus in the successive waves of transition to democracy that characterized these decades: the transition from military to civilian rule in Latin America; the shift from apartheid to majority rule in South Africa; and the transitions to democracy in Eastern Europe and further afield following the fall of the Berlin Wall.

Thus, to date, much of the literature and commentary in the transitional justice field has been focused on dealing with the legacies of the past, generally conceived in terms of the depredations of previous regimes.⁹ In general, this has reflected a consensus that the most appropriate means to confront and make accountable was to apply what Teitel refers to in her contribution to this volume as “universal” conceptions of justice, a concept broad enough to include international human rights and international humanitarian legal norms, but also encompassing more abstract “rule of law” standards. From this, sprang a discourse on the relative merits of criminal trials and truth commissions as accountability mechanisms; on their respective roles in truth-telling; and on the relationship between both truth-telling and trials (or their absence through amnesty) and concepts of “reconciliation.”

A key aspect of many transitional processes has been the role played by law and legal institutions in facilitating, extending and underpinning reform, revisions and accountability. Moreover, the application of international legal norms has become critical both in mediating the worst excess of conflict, and in defining what forms of conflict are taking place (thus opening a route to their resolution). The past decade has seen striking developments in international law and practice in relation to conflict situations. These have included the institution of international criminal tribunals for the Former Yugoslavia and Rwanda; the re-

9. ELAZER BARKAN, *THE GUILT OF NATIONS, EXPLORING THE GLOBAL POLITICS OF RESTITUTION FROM 1945 TO BOSNIA* (2000); ALEX BORAINÉ ED., *DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA* (1994); NUNCA MÁS: REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED (Eng. ed., 1986); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Human Rights Violations*, 78 CAL. L. REV. 451 (1990); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past*, 20 L. & SOC. INQUIRY 7 (1995); Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering*, in *POLITY* (2001); and Luc Huyse, *Justice After Transition: on the Choices Successor Elites Make in Dealing with the Past*, 20 L. & SOC. INQUIRY 51 (1995).

invigoration of international humanitarian law, particularly as it relates to non-international armed conflict through the operation of these tribunals (and a related expansion of the concept of "crimes against humanity");¹⁰ an increasing convergence of international human rights law and international humanitarian law;¹¹ and agreement of the Rome Statute on the International Criminal Court.¹²

These might be taken as constituting a linear progression in the application of universal conceptions of justice; yet, as Teitel points out in this volume, there are countervailing pressures. While ever-increasing globalization might be seen as smoothing the path for the application of international norms, the disparity in wealth, which it seems to emphasize, creates tensions of its own, and therefore, fresh challenges to these norms. Critically here, the transitional justice has been associated with punitive and/or conciliatory notions of justice, rather than heralding a redistributive focus. In this view, the transitional moment can serve to perpetuate the position of economic and political elites within transitional societies, rather than empower those socially and economically marginalized within the "problem" State.

10. The Security Council established the International Criminal Tribunal for the Former Yugoslavia ("ICTY") pursuant to S.C. Res. 808, U.N. SCOR, 48th Year, 3175th mtg., at 1, U.N.Doc. S/RES/808 (1993). The literature on the ICTY is fast becoming unmanageable. For some useful contributions see S. D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 A.J.I.L. 57 (1999); K.D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 A.J.I.L. 97 (1999); J.R. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* (2d ed. 2000).

11. See generally Fionnuala Ní Aoláin, *Fluid Boundaries – Charting the Relationship between Human Rights and Humanitarian Law*, 28 ISR. YEARBOOK OF HUM. RTS. 97 (1999); THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989); R.E. Vinuesa, *Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*, 1 YEARBOOK OF INT'L HUMANITARIAN L. 69 (1998); Y. Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in T. MERON ED., *HUMAN RIGHTS INTERNATIONAL LAW* (1984); T. Meron, *The Humanization of Humanitarian Law*, 94 A.J.I.L. 239 (2000); and C. Campbell, *Peace and the Laws of War: The Role of International Humanitarian Law in the Post-Conflict Environment*, 82 INT'L REV. OF THE RED CROSS 627 (2000).

12. Rome Statute of the International Criminal Court, U.N. Doc. A/Conf/183/9 (1998). See generally M.H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 A.J.I.L. 22 (1999); P. Kirsch, and J.T. Holmes, *The Rome Conference on an International Criminal Court: the Negotiating Process*, 93 A.J.I.L. 2 (1999); M. McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335 (2000); and D. McGoldrick, *The Permanent International Criminal Court: An End to the Culture of Impunity?*, 1999 CRIM. L. REV. 627 (1999).

Moreover, by definition, globalization has a corrosive effect on the institution with the primary task of upholding justice standards: the Nation State. More immediately, the post-9/11 world with its prospect of a “war of terrorism,” for which no end is in sight, seems to stand assumptions about the exceptional nature of violent conflict, and the normalcy of peace, on their heads. Whither transition if the global norm is a violent one? Adding to this is the increasingly critical approach evident in relation to some previously lauded transitional processes and initiatives. Hamber, for instance, in his contribution to this volume, raises some concerns in relation to the South African Truth and Reconciliation Commission (“TRC”). Meanwhile, the hollowness of some more recent transitions has also emerged as a cause of concern.¹³ This unease relates not just to the depth of reform experienced and the realization that the embedding institutional change is a protracted process subject to consistent re-negotiation, but also attests to the manipulation of law in such contexts. Given these challenges, it is appropriate, therefore, that before moving to examine the specificity of the Northern Ireland experience, this volume attempts some stock-taking on the current state of transitional justice discourses.

At the heart of these discourses has been a general concern (both conceptual and operational) with the fit between universal standards of justice and the transitional goal of embedding peace and democracy. The domestication of these standards has been a critical element in promoting, constituting, and enabling the transitional moment(s) in many societies. The problem, of course, is that the “fit” is not as neat as we might think, or as unproblematic as has sometimes been assumed. This question of “fit” is also the space of local and global interaction where the specificity of the transitional challenge is located, and one that is explored throughout the contributions in this volume.

At its most basic, the problem is little more than a technical

13. Brandon Hamber's Essay in this volume makes a notable contribution in this context, identifying the South African Truth and Reconciliation Commission's lack of engagement with the “institutional” and specifically, economic beneficiaries of apartheid. See Brandon Hamber, *Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 *FORDHAM INT'L L. J.* 1074 (2003). The point is aptly illustrated by the series of cases which have come before the South African courts demanding enforcement of the constitutional provisions on housing, access to land, health care, food, water and social security. See e.g. *Government of the Republic of South Africa et al. v. Grootboom*, Case CCT 11/00, Judgement of Oct. 4, 2000.

one: what exactly does international law or the rule of law require? For instance, a proposed amnesty law might be measured against the apparently contradictory demands of international human rights law and international humanitarian law in relation to prisoner release at the end of conflicts.¹⁴ Generally, though, the problem manifests at a deeper level: in addition to the question of what international law or the “rule of law” mandates, there is the question of the extent to which that mandate can be accommodated in a given situation — a search for a tailored solution to match the particular context of the society dealing with its past.¹⁵

Both international human rights law and international humanitarian law might, for instance, demand that a particular crime not be amnestied, but in a particular situation, the requirements of “reconciliation” might be viewed as requiring that very amnesty. It is on such dilemmas that the crux of transitional justice lies. Efforts to square the circle typically involve attempts to ensure that where a course of action mandated by international law is not strictly adhered to, the rationale underpinning that mandate is addressed in other ways. For instance, where an amnesty operates to prevent trial providing accountability and truth-telling, these goals/functions could still be discharged by the truth commission mechanism.

Therefore, the accommodation with the local in transitional situations typically goes beyond mere technical “fitting,” to involve some departure from universal justice standards (concep-

14. In general, international human rights law tends to lean against amnesties, at least in relation to serious violations. See generally R.O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L. J. 857 (1995); N. Roht-Arriaza & L. Gibson, *The Developing Jurisprudence of Amnesty*, 20 HUM. RTS. Q. 843 (1998); and D. Cassel, *Lessons from the Americas: Guidelines for International Responses to Amnesties for Atrocities*, 59 L. & CONTEMP. PROBS. 196 (1996). There is, therefore, an apparent contrast with some provisions of international humanitarian law in relation to civil wars. Thus, the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”) (entry into force Dec. 7, 1978) provides that “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty.” *Id.* art. 6(5). But this provision is best interpreted as only applying to crimes for which amnesty is possible, and therefore, in a manner that is largely compatible with international human rights law. See Roht-Arriaza & Gibson, *supra*, at 864-66. For an overview see generally T. McCormack & G. Simpson eds., *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* (1997).

15. Priscilla Haynor's book sets out these multiple models. See PRISCILLA HAYNOR, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY*, ANNEX I (2001).

tualized in ideal rule of law terms, and/or the strict requirements of international law). To some extent, therefore, there is generally a loss — potentially quite a serious one. The loss often lies in the pragmatic compromises made at conflict's end, which fall below the standards of accountability mandated by international law.¹⁶ The specific application of human rights and humanitarian law is testament to codification of a body of principles, which function as more than prescriptive rules. Their abandonment or weakening is cause for concern on multiple fronts, and it is this concern that is central to many transitional justice discourses. Evidently, this is the gap which victims of human rights violations find most abhorrent and which has become the site for protracted struggles (both legal and political) about the validity of any overall compromise. As such, departures from universalized standards are not merely abstract legal phenomena, but the site of intense local attrition.

One obvious source of weakening lies in a deliberate ignoring of international law and its processes. A more insidious kind of weakening may occur where a State appropriates international law standards on its own terms, and for its own purposes; a variant is where it purports to recognize the standards in the abstract, only to appropriate to itself the decision on their applicability. Where this occurs, the standards and concepts in question may tend to lose the value that comes from their autonomous status in international law. By autonomy in this context we mean not that the interpretation of international law is never affected by the status of the parties in relation to whom the law is invoked,¹⁷ but rather, that there are limits to the malleability of the

16. Note here the rider placed by the Secretary-General of the United Nations on the peace agreement signed in Sierra Leone (to the extent that the amnesty provisions could not be taken to apply to crimes against humanity carried out by the protagonists to the conflict). SEVENTH REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS MISSION IN SIERRA LEONE, U.N. Doc. S/1999/836, July 30, 1999, para. 7. This understanding was reaffirmed in the Security Council's resolution calling on the Secretary-General to draw up a Statute for the special court. See U.N. Doc. S/RES/1315 (2000), pmbl. para. 5.

17. For instance, if the jurisprudence of the European Court of Human Rights in relation to states of emergency is examined, it is arguable that the liberal-democratic pedigree of the British State must be counted as a key factor in explaining the relatively indulgent approach displayed to the United Kingdom ("UK") in such cases as *Ireland v. UK*, 25 Eur. Ct. H.R. (Ser. A) (1978) and *Brannigan & McBride v. UK*, 19 Eur. Ct. H.R. 539 (1994). By contrast, the caselaw in relation to emergencies from Turkey (e.g. *Aksoy v. Turkey*, 23 EUR. H. R. REP. 553 (1996)) and Greece (see 1 EUROPEAN COURT OF

concepts. Thus, some international adjudicatory bodies have explicitly insisted on the autonomous meaning of some international law concepts,¹⁸ and parallels can be drawn with the well-recognized phenomenon of the “relative autonomy” of domestic law in situations of conflict.¹⁹ If, as Cassese expresses it, international law functions not simply as a prescriptive framework, but also as a mediating paradigm,²⁰ this mediation turns on the autonomy of the law. Were it not for this autonomy, States would be free to use law in whatever way they wished; all would ultimately be reducible to politics, and there would be little point in examining the specific role played by law in transition (other than, perhaps, in exploring its role in legitimating purely political decision-making).

In the aftermath of the 9/11 atrocities and of the war in Afghanistan, and in the midst of the Iraqi conflict, international law in relation to violent conflict, and universal conceptions of the rule of law in general, are in crisis. The implications of this crisis for transitional justice are probed either directly or indirectly by several of the contributors to this volume. Teitel sounds the loudest note of caution, emphasising her concern with the extent to which the last decade has seen the aim of transitional justice shift from that of establishing universal conceptions of the rule of law and democracy, to the maintenance of security and peace. This, in her view, has frequently entailed the generation of formulae designed to enhance the legitimacy of processes of Nation-building in the fragile States of recent transitions. Conceptions of the rule of law in such situations have

HUMAN RIGHTS, THE GREEK CASE: REPORT OF THE COMMISSION (1969)) suggest that democratic shortcomings in the modern Turkish State and in Greece at the time of the Colonels rule provided a back-drop for a much more stringent approach. *See generally* Fionnuala Ní Aoláin, *The Emergency of Diversity: Differences in Human Rights Jurisprudence*, 19 *FORDHAM INT'L L. J.* 101 (1995) and Oren Gross, *Once More into the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 *YALE J. INT'L L.* 437 (1998).

18. Thus, the European Court of Justice has been at pains to insist that the concept of “worker,” as enshrined in the Treaty of Rome, has a “Community” (i.e. an autonomous) meaning. From this, it follows that individual Member States of the European Union (“EU”) are not free to ascribe to the concept whatever meaning or definition they see fit. *See* W. WYATT & A. DASHWOOD, *WYATT AND DASHWOOD'S EUROPEAN COMMUNITY LAW* 241 (3rd ed. 1993); and Hoekstra (née Unger), [1964] *E.C.R.* 177.

19. For a discussion of the point in the context of the use of law in the struggle against the old South African regime, *see* RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994* 7-21, 523-49 (1995).

20. *See* ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* (1986).

tended to be quite specific and partial, tied to the Nation-building process. Thus, in the rush to create Nation-State structures, (whether fully functional or not), there is a harm to principle, one which has measurable costs at the local and global levels.

The dilemma thus sketched is, of course, scarcely new; rather, it has been at the core of transitional justice analyses from their inception. The novelty of the challenge identified by Teitel can perhaps best be understood in terms of emphasis and of the impact of fresh external factors. Some kind of balancing exercise is always implicit in the transitional context, but that balance may have recently shifted towards partial, and away from universal, conceptions of the rule of law. At the same time, globalization has, in her view, meant that transitional justice-related actions have increasingly been taken independently of the State. This has corresponded with increasing disparities in wealth heralded by globalization. But the justice concerns evident in this globalized context have been limited and determinate, focusing on restitution for known past losses. This particular manifestation of "transitional justice" has displaced broader (redistributivist) reform projects; to that extent, it may represent a move away from progressive politics. Thus, the subtext to Teitel's critique of contemporary developments can be located in a call for a progressive politics in situations of transition, tied to a reassertion of the relative weight to be assigned to universal conceptions of justice.

Some related criticisms also surface in Hamber's contribution, which focuses on the South African TRC. In part, what he offers is a critique of the use of the term "reconciliation" to cloak what in fact are unpalatable political compromises, the heaviest burdens of which are borne by the conflict's victims. Paralleling some of Teitel's concerns about a shift from universal conceptions of justice, Hamber posits a significant cost to human rights norms when these norms are invoked to justify, or perhaps to rationalize, particular transitional justice mechanisms (such as truth commissions). In fact, the rationale for these mechanisms, may, in the eyes of their framers, lie in their instrumental (political) value. Thus, in the post-conflict environment, damage to the norms may become apparent when "human rights as a concept has become associated with the language of pragmatic polit-

ical compromise.”²¹ In terms of the analysis presented above, such appropriation of the language of human rights represents a damaging failure to respect the autonomy of international human rights norms, a failure that echoes Teitel’s complaint about partial and specific conceptions of the rule of law.

This theme — the need for a critical interrogation of the use or non-use of international law in situations of transition and in violent conflict generally — is one that surfaces throughout this volume. In an analysis that points to concerns similar to those of Hamber, Schabas cautions against easy assumptions about the reach of international law in relation to the 9/11 attacks, and specifically, against the categorization of such attacks as “crimes against humanity,” however attractive this label might be in presentational terms. Instead, he suggests that for attacks such as these, where the State upon whose territory the acts were committed is ready and willing to prosecute, the appropriate legal home is domestic criminal law. Schabas, though, is careful to avoid any generalized downplaying of the importance of the normative developments in recent years in relation to crimes against humanity and war crimes in non-conventional conflict. Rather, he sees these developments as being of “decisive importance,” but only where the appropriate international threshold is reached. Implicitly, therefore, Schabas is insisting upon respect for the autonomy of such threshold international law concepts.

Cavanaugh’s contribution, which focuses on international humanitarian law, should likewise be understood as an insistence upon the need for respect for the autonomy of such threshold concepts. Cavanaugh locates the collapse of the Israeli-Palestinian peace process in Israel’s failure to recognize the applicability of the Fourth Geneva Convention of 1949 (which governs the administration of occupied territory). Thus, the process lumbered along without the key mediating element of applicable international law norms. In a similar vein, though without reference to the Israeli-Palestinian conflict, Teitel cautions against the running together of human rights law and international humanitarian law. Since, in effect, the threshold concept of “armed conflict” would be thereby abandoned, other related antinomies (such as peace v. war, and civilian v. combatant) could, in her view, also fall.

21. Hamber, *supra* n.13, at 1083.

What emerges from these contributions is not simply a snapshot of the current global crises in international law and the rule of law generally in situations of conflict and of transition from conflict (though it certainly is that). Rather, this sense of crisis is accompanied by an insistence on the need for respect for the autonomy of international human rights and humanitarian law in such situations — a call for a re-engagement with those very concerns which led to the development of the concept of transitional justice in the first instance.

II. *THE DISTINCTIVENESS OF THE NORTHERN IRELAND TRANSITION*

We claim that legal and political developments in Northern Ireland in the wake of the Agreement are best analyzed in the frame of transitional justice discourses. In doing so, we acknowledge the fluidity of the discourse itself, and the strains upon it as the complexity of the transitional process is revealed over time in other jurisdictions. We also note the broader context of the global political uncertainty experienced post-9/11. While acknowledging commonality with other transitional situations, there are a number of complexities in the Northern Ireland experience which also enrich the transitional debate, or which may, at least, force transitional justice analyses to grapple with new problems.

One of these is the multi-layered legal and political nature of change in Northern Ireland — less one single uniform transition than the sum of multiple, and partly sequential shifts. The Agreement is a marker for a particular end point in the conflict, but it is not an isolated end point. The Northern Ireland conflict has been the object of various attempts to stymie violence through legal and political measures since the late 1960s. In retrospect, few of these attempts show much evidence of a joined-up approach. One aspect of the conflict-management approach adopted was the application and manipulation of the criminal law (frequently though not invariably described as “special,” “emergency,” or “anti-terrorist”) as a means to control conflict.²²

22. FIONNUALA NÍ AOLÁIN, *THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND* (2000); DERMOT P.J. WALSH, *THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND* (1983); DERMOT P.J. WALSH, *The Impact of Antisubversive Laws on Police Powers and Practices in Ireland: The Silent Erosion of*

This manipulation served to militate both against the prospects of success of political initiatives, and against the positive effects of meaningful legal reforms in other areas (amongst them employment, housing and electoral rules).²³ Phil Thomas' contribution adds another layer to that complexity by setting out the extent to which emergency powers rehearsed and bred in the local environs of Northern Ireland seeped across to define the architecture of the "anti-terrorist" powers of the United Kingdom ("UK") as a whole (a process which, as O'Connor and Ruhmann's Article illustrates, finds echoes in current developments in the United States). Evidently, such use of law as a conflict-management tool creates a number of significant barriers for legal transformation in the post-conflict environment.

As regards the political dimension, from the Sunningdale Agreement (1973) through to the Anglo-Irish Agreement (1985) (and various failed initiatives in-between), there were persistent attempts to solve the conflict politically. In each initiative (partly successful or otherwise), a different point of departure was created for subsequent intervention. This stop-start aspect tells us something about a continuum of transition, whereby the successful intercession is not stand-alone, but is intimately tied to a set of circumstances previously established. Only in connecting these interventions can we come to a full understanding of the conditions necessary to bring a conflict to a particular end point. It is also a useful means to map the pivotal role that the legal process and institutions have played in enabling and managing the conflict experience.

In moving from previously established points (particularly that created by the Anglo-Irish Agreement (1985)), to the political space currently provided by the Agreement, the involvement of external parties in the negotiation process has been critically important. McEvoy and Morrison identify four key external influences. First, the influence of comparative situations on "scene

Individual Freedom, 62 TEMP. L. REV. 1099 (1989). These approaches have a long, if undistinguished, history. See COLM CAMPBELL, EMERGENCY LAW IN IRELAND, 1918-1925 (1994); Tom Hadden, Kevin Boyle & Colm Campbell, *Emergency Law in Northern Ireland: The Context*, in ANTHONY JENNINGS ED., JUSTICE UNDER FIRE 1 (1990).

23. See e.g. Fair Employment Act (1989) (Eng.). See generally DAVID SMITH & GERALD CHAMBERS, INEQUALITY IN NORTHERN IRELAND (1991); Stephen Livingstone, *Using Law to Change a Society: The Case of Northern Ireland*, in S. LIVINGSTONE AND J. MORISON EDS., LAW, SOCIETY AND CHANGE 51-70 (1990).

setting.” Second, the influence of international “ideas, norms and values” on the constitutional architecture of the Agreement. Third, the role of supportive international players in the implementation of acutely sensitive issues. Finally, there was the internationalization of key security matters — specifically, the release of politically motivated prisoners, policing, and weapons decommissioning.

In charting this internationalization, a distinction can be drawn between the highly formal role played by the Republic of Ireland, and the relative informality of that played by other States (the most important of which was the United States). To that extent, the transition has been less formally internationalized than some others (most notably Bosnia and Israel/Palestine). Perhaps the most notable aspect of the external mediation in the Northern Ireland context has been its consistency, and the support of two guarantor States (Ireland formally and the United States less formally) for that involvement. The simple export lesson on this transitional prop may be that successful external support requires relentless focus and a long attention span. It is also evident that maintaining pressure on the unacceptability of the *status quo* has operated to force the pace of reform and to maintain the necessity for it, and as such, has forced parity in the internal political interplay.

The Agreement is also marked out by its classically consociational political arrangements. The depth of these arrangements can be seen as the means to accommodate internal self-determining claims impacting upon the Nationalist/Republican community by means of fulsome internal participation,²⁴ adding the side benefit of accommodating international human rights norms to democratic participation on the basis of equality and non-discrimination.²⁵ Moreover, this internal self-determination element of the Agreement is bolstered by the provisions recognizing an external right of self-determination to be exercised both by the demos of Northern Ireland and the Republic of Ireland.²⁶

24. See Christine Bell, & Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-Determination? Self-Determination, Group Accommodation and the Belfast Agreement*, 22 FORDHAM INT'L L. J. 1345 (1999).

25. BELL, *supra* n.4, at 172-76.

26. Agreement, *supra* n.1, art. 1(ii). Article 1(ii) sets out that . . . it is for the people of the island of Ireland alone, by agreement between

The internal political arrangements contained in the Agreement provide for proportionality, power-sharing, and mutual vetoes for both Nationalists and Unionists. While shades of this model have been duplicated in other transitional agreements,²⁷ the Agreement is marked out by the layers and interconnectedness of these political requirements, so that at each stage of the local political process there is a forced mutual dependency between opposing political traditions. What this has produced, while the Assembly has been operational, is a high level of mutual communication between political parties represented in government, so as to further legislative agendas. There are early indications, despite the suspension of the local institutions, that the forced political interplay has produced reliance between political groupings, and has operated in the non-contentious spheres of a divided society (e.g. health, education, and finance) to produce effective and operative government. This forced institutional architecture is testament to the capacity of the structure itself to both shape the nature of the "political" in deeply divided societies, and to open up and make more inclusive the political process.²⁸

Finally, part of the uniqueness of the transitional arrangement arises from the consensual agreement of two sovereign States to cede their sovereign interests to accommodate an end to political violence. On the part of the Republic of Ireland, there has been a substitution of a constitutional aspiration to peaceful unification in place of the old claim to Northern Ireland as-of-right.²⁹ The compromises made by both States are not insignificant, including electoral contingency on territorial integrity for the UK, and the eschewing of its territorial claim to the territory of Northern Ireland for the Irish Republic. These

the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the Agreement and consent of a majority of the people of Northern Ireland.

Id. For a discussion of the significance of this formulation in the context of the international norms in relation to self-determination see Campbell, Ní Aoláin & Harvey, *supra* n.3.

27. See BELL, *supra* n.4, at 171 and 176.

28. There is also a view that such opening-up facilitates existing political elites from their respective communities, and excludes others, such as women and marginalized political groupings, from the decision-making process.

29. Campbell, Ní Aoláin & Harvey, *supra* n.3.

aspects of the deal itself and the transitional arrangements that followed it, indicate that the Agreement occupies a space, which is not only legal, but also symbolic. Indeed, it affirms that agreements to end protracted conflicts require not only intricate legal concepts to carry them forward, but can only function against a backdrop of reliable political interests where an appropriate degree of compromise is evident. That said, what is clear from a number of submissions to this Special Issue is that once the deal itself is in place, law becomes the primary vehicle by which its multiple components can be delivered to fruition in the domestic context. This has proved a heavy burden for the legal system in Northern Ireland, which has not uniformly demonstrated that it is up to the task. In fact, as in most transitional societies, law plays a mediating, constitutive, and paradoxical role. It is the vehicle for change and an object of reform in its own right.

III. *THE PROBLEM OF THE PAST*

Despite a lack of explicit provision within the Agreement for dealing with the human rights abuses experienced during the conflict, the dilemma is present in multiple social and legal contexts. Thus, it is difficult to disagree with Bell's assertion that in Northern Ireland "the present is the past." Bell's analysis further demonstrates that the past has been inserted in multiple ways into the Agreement itself, making the analysis of confronting the past a multi-faceted and complex exercise. Bell offers a comprehensive study of what she terms a "piecemeal" and discrete engagement with the past in the Agreement and its progeny. She sketches an engagement that is deliberately incomplete and identifies some positive aspects to this. These include a pragmatic assessment of what is possible in a deeply divided society; the scale of the violations compared with other jurisdictions where similar truth process have been advocated; and the continued function of legal process throughout the conflict and, to a partial extent, of remedy. She argues that the overall benefit of this approach allows political movement on the issues that can be progressed and leaves to the side those which cannot. Bell also exposes the drawbacks that come with a failure to engage systematically with the past in Northern Ireland. These include the linkage of the past to the current unravelling of the peace

process, and the intrusion of surrogate debates about the past on all subsequent processes of institutional transformations.

A persistent feature of the past-centered dialogue in post-conflict societies is the stated desire by multiple parties for a formal truth-telling mechanism. The ideal model touted for this purpose is often the South African TRC.³⁰ Brandon Hamber's contribution to this volume makes clear that truth processes of this formula have high costs for the victims of human rights abuses. Such costs are generally not realized until the exercise is well under way or complete. He argues forcefully that truth processes are the least focused on the actual victims of human rights violations, and instead, constitute processes of political and social compromise. Nonetheless, they are packaged as responses to the needs of victims, and raise expectations for those groups that generally cannot be fulfilled. This does not undermine the value of truth processes *per se*, but acts as a caution to the assumption that victims' needs are fully met within them. He asserts that "Being truly victim-centered . . . requires a paradigm shift in which victims' rights start to influence the transitional justice agenda to a far greater degree."³¹

Hegarty's assessment of the Bloody Sunday Tribunal bears witness to this local cost. She captures the stymieing of victims' voices, their channelling into a narrative form which fails to correspond to their actual experiences, and the power which the State continues to exercise over the articulation of events through the application of legal process. Hegarty also makes clear that the structural limitations of the UK Inquiry model bear directly on both the failure to address victims' needs, and upon the broader matter of instilling legitimacy and confidence in the Saville Tribunal. Bearing out the centrality of the past for the present in Northern Ireland, O'Rawe's analysis of police reform reveals that the failure to acknowledge the RUC's past in the Patten Commission's proposals for reform has served to limit the capacity for genuine and far-reaching institutional reform.³²

Hegarty's analysis further probes the meaning of "truth" in the transitional context, and opens up an interesting vista on our

30. TRUTH AND RECONCILIATION COMMISSION, FINAL REPORT (1998).

31. Hamber, *supra* n.13, at 1087.

32. Bell echoes this analysis in her reflection on the difficulty of moving ahead with institutional reform when it is unclear what the agreed end point will be. *See supra* n.4.

understanding of the purposes of accountability in the post-conflict moment. She distinguishes between multiple kinds of “truth,” pointing out that

Demands for inquiries are often made on the basis that people wish to “know the truth”. A deeper examination of these demands reveals that people sometimes say: “I want the truth,” when generally they mean, “I want *my truth* acknowledged” . . . However, it is sometimes the case that people call for public inquiries because they believe that *they* know the essential truth about a situation and simply want the State to “own up.”³³

Under this rubric, truth-telling is not about reconciliation, nor even about accountability in a formal sense; rather, it functions as a public affirmation for victims who have experienced human rights violations. The essential complexity of this, affirmed both by Hegarty and Bell, is the lack of coherent and agreed understandings of the function of the “truth-telling” by the multiple actors who facilitate it. Moreover, setting up formal mechanisms can act to obscure or distort truths, as understood by implicated communities. The misrepresentation of communal or individual truths can frequently be ascribed to the constraining and distorting role that legal rules and structures force upon the victims and participants in truth processes. In this lies a sombre message and an underscoring of the paradoxical status of legal process in times of transition.

Without any doubt, the transitional landscape in Northern Ireland is defined by the immediacy of the conflict itself, and the need to resolve on a communal level unfinished business related to it. However, unlike other transitional contexts, what in part distinguishes the transitional process in Northern Ireland, is that much of its negotiated emphasis lay with institutional reform and a creative envisioning of the political process, rather than a past-focused preoccupation. In this extensive institutional revision lies much of what is unique in the Northern Ireland transition. The inclusion of the blueprint for extensive internal political and legal reform is also testament to the active participation of civil society groupings in and around the formal peace process, as well as the inclusive nature of the final negotiations

33. Angela Hegarty, *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 Fordham Int'l L.J. 1148, 1158 (2003).

themselves.³⁴ There is room for debate as to whether the balance between forward-looking reform and past-focused accountability has been correctly calibrated in the jurisdiction. Some of these debates are further probed below.

IV. *THE DYNAMICS OF INSTITUTIONAL CHANGE*

As outlined above, much transitional justice analysis has been past-focused. While this aspect is reflected in this volume, there is a conscious attempt to move towards a focus on future human rights protection and on institutional reform. Implicit in this is a claim for a broad conception of transitional justice as being concerned not solely, or even primarily, with the legacy of past violations. Rather, the term is conceived as being concerned with all legal dimensions that come to the fore in the transition from violence to long-term peace, including, therefore, human rights capacity-building.

Institutional re-visioning is at the heart of all three formal strands of the Agreement: Strand One — internal political arrangements within Northern Ireland; Strand Two — bilateral relationships between Northern Ireland and the Republic of Ireland; and Strand Three — multilateral relationships between Northern Ireland, the UK and the Irish Republic. Each of these three elements radically re-configures existing political structures both within Northern Ireland and as between Northern Ireland, the UK and the Republic of Ireland. In addition, the Agreement envisaged a series of further measures with significant capacity for transformative effect, including a Bill of Rights, a Criminal Justice Review, a Policing Commission, and a scheme to release prisoners convicted in special, jury-less, “Diplock courts,” which effectively functioned as an amnesty provision. New rights-focused institutions were created, notably the Human Rights Commissions, North and South, with the promise of robust powers to mainstream human rights protections and to be readily accessible to victims of violations. The implicit deal recognized by all parties and governments involved was that that deep change was the cost to be paid for an end to violent conflict (though whether or not the full potential for change has yet been realized is an open question).

34. See Paul Mageen & Martin O’ Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 *FORDHAM INT’L L.J.* 1499-1538 (1999).

Many of these institutional departures make a significant contribution to affirming what is possible and necessary in the transitional context, and indeed, what makes for the possibility of transformation in a deeply divided society. The extent of this institutional change is illustrated by the contribution of McEvoy and Morrison, who cogently argue that in the constitutional context, the Agreement functions as a form of constitution in its own right. In doing so, it has the possibility to redefine and reshape the nature of constitutional discourse outside Northern Ireland — specifically that of the UK as a whole.

Nonetheless, institutional changes are not to be taken for granted. This is particularly true of the transitional society, where the business of reform or transformation is, by definition, fraught and incomplete. Resultantly, such reform is never assured, and the possibility of its failure or negation is consistently present. The conditionality of institutional reform — an under-theorized aspect of the transitional society — strongly resonates in the contributions of O’Rawe and Harvey. O’Rawe discerns and exposes distinctions inherent in the language of police “change,” for a force that has played a distinctive role throughout the preceding conflict. Her insightful Article emphasizes the significance of the language of reform, and reveals a difference between conversations about police professionalism and efficiency on the one hand, and a commitment to truly meaningful transformation on the other. The difference is critical as only the latter can offer the possibility of policing legitimacy in a post-conflict society. Harvey, in parallel vein, examines the obstructive function that has been exercised by orthodox constitutional law discourse in the UK on the Agreement. His review of litigation related to testing and elaborating the powers and institutions created by the Agreement illustrates the potential of the post-conflict environment to block progress gained through political negotiation. Both authors remind us that the business of transition is extended and extensive. More particularly, one paradox of a lack of temporal limits on the transitional process is that formal agreements mark only one space on the continuum of change. Thus, assuming that transitional processes are concluded successfully by “paper-perfect” agreements is absolutely misleading. The real work of successful local transition lies in the post-Agreement context.

V. CONCLUSION

The Articles and Essays included in this Special Edition seek to illuminate and probe the post-Agreement moment in Northern Ireland. Together, they highlight a number of key themes. First, that the concept of transition itself requires critical analysis and re-interpretation in view of comparative experiences and in the light of the contrast between Northern Ireland's problematic historic legacy and the overall liberal-democratic nature of the UK State. Second, that "dealing with the past," though an important aspect of transitional legal discourse, is not sufficient by itself to understand the complexity of change in post-conflict societies. Third, that similarly situated transitional societies can share extraordinary interchange and knowledge to their mutual benefit. Fourth, that paper change, however neatly packaged, is not enough. Real change requires measuring the legitimacy of institutions and the transformation as experienced on a daily basis by ordinary citizens, specifically those who have been historically alienated and excluded from such institutions. Finally, we are reminded of the burdens that transitional societies carry with them. Specifically, the legal baggage of extraordinary and repressive law whose tentacles stretch far beyond the end of conflict, and which can operate to perpetuate the exception and the extraordinary in the new dispensation.

The expectations and burdens on the transitional societies are high. This in part explains the extraordinary interest in their successes and failures. That interest can also be explained as reflecting an understanding that the transitional moment is a unique political and legal pause — a chance to reinvigorate and renew — one that comes rarely to any society. As the transition in Northern Ireland illustrates, the stakes are particularly high in a region that has experienced prolonged violence. We hope that these Articles and Essays illustrate the scope of the transformation being experienced, as well as the challenges to be surmounted. We also hope that they demonstrate the ability of intellectuals and scholars to engage in the world around them in meaningful and practical ways — offering routes through uncharted waters and furthering the process of transformation itself.